Lim Kui Hin v Public Prosecutor

HIGH COURT (SIBU) — CRIMINAL APPEAL NO SBW-41–4/7 OF 2012
YEW JEN KIE J
19 OCTOBER 2012

Constitutional Law — Fundamental liberties — Personal liberty — Whether person committed by court to drug rehabilitation centre not given opportunity to challenge evidence against him — Whether chemist's report on urine test and doctor's report certifying him drug dependant not read over and explained to accused — Whether request to not be sent to centre and to be given another chance was making of plea or appeal and not making of 'representation' — Whether doctor certifying person as drug dependant required to state tests done to make such certification

The sessions court had ordered the appellant to undergo treatment and rehabilitation under s 6(1)(a) of the Drug Dependants (Treatment and Rehabilitation) Act 1983 ('Act') at the Drug Rehabilitation Centre ('the centre') in Kuching, Sarawak for two years and thereafter to undergo supervision by the Agensi Anti-Dadah Kebangsaan for a further period of two years. In making the order the court relied on a chemist's report which showed the presence of amphetamine and methamphetamine in the appellant's urine and a doctor's report ('P2') which certified the appellant as a drug dependant. In his instant appeal to the High Court against the order the appellant contended that (i) it was wrong of the trial court to have relied on P2 without finding out from the doctor concerned what tests he had done to certify him as a drug dependant and (ii) he was not given an opportunity to make representation. The appellant contended that when he asked the trial court to give him another chance and to not commit him to the Centre as he needed to take care of his sick mother and his family he was not making a representation but an appeal or plea. The appellant submitted that the right to representation meant the right to protest, which, in the light of art 5(3) of the Federal Constitution, meant the right to challenge whatever evidence was brought against him.

Held, setting aside the lower court's order:

(1) The notes of proceedings showed that the contents of the medical report (P2) and the chemist's report were not read and explained to the appellant thereby depriving him of the opportunity to protest if he had wanted to. As this was a case which involved deprivation of liberty, a strict compliance with the statutory requirement was required. From the notes

of proceedings and grounds of judgment it was clear the appellant was merely given an opportunity to make his appeal or plea but not the opportunity to make his representation (see paras 8–9).

(2) Given that it was a case which involved deprivation of liberty, care should have been taken by the trial judge to explain to the appellant when he was called upon to make his representation and the purpose of it. It was meaningless to tell the appellant to make a representation if he was not told that it was the opportunity for him to protest or object to the reports and the facts presented by the police or anything presented against him and whether he would like to engage counsel to represent him. Nothing in the notes of proceedings showed that the trial judge had explained this to the appellant (see para 8).

(3) The court agreed that it was insufficient for the purpose of deciding whether a person was a drug dependant within the meaning of s 2 of the Act to rely solely on the positive result of a person's urine test. The person must be put under observation and tests carried out to see whether he manifested symptoms of drug dependence (see para 5).

(4) However, based on the format of Form 2 it sufficed to merely state '*Setelah menjalankan ujian-ujian yang perlu diatas …*' and there was no necessity to state what test or steps had been taken to certify the person as a drug dependant. As such, there was no merit in the appellant's contention that the trial judge was required to find out from the doctor as to what tests he had done to certify the appellant a drug dependant (see para 5).

[Bahasa Malaysia summary

Mahkamah sesyen telah memerintahkan perayu untuk menjalani rawatan dan pemulihan di bawah s 6(1)(a) Akta Penagih Dadah (Rawatan dan Pemulihan) 1983 ('Akta') di Pusat Pemulihan Dadah (pusat tersebut) di Kuching, Sarawak selama dua tahun dan kemudiannya menjalani pengawasan oleh Agensi Anti-Dadah Kebangsaan untuk tempoh dua tahun selanjutnya. Dalam membuat perintah Mahkamah bergantung ke atas laporan ahli kimia yang menunjukkan terdapat amphetamine dan methamphetamine di dalam air kencing perayu dan laporan doktor ('P2') yang mengesahkan perayu sebagai penagih dadah. Dalam rayuannya ini ke Mahkamah Tinggi terhadap perintah tersebut perayu berhujah bahawa (i) adalah mahkamah perbicaraan adalah salah kerana bergantung ke atas P2 tanpa mendapatkan daripada doktor berkenaan ujian apakah yang telah dilakukannya untuk mengesahkan dia sebagai penagih dadah dan (ii) dia tidak diberi peluang untuk membuat representasi. Perayu berhujah bahawa apabila dia memohon mahkamah perbicaraan untuk memberi dia peluang sekali lagi dan untuk tidak menghantar dia ke pusat tersebut kerana dia perlu menjaga ibu dan keluarganya dia bukan membuat representasi tetapi merayu atau mempli.

A Perayu berhujah bahawa hak untuk representasi bermaksud hak untuk memprotes, yang mana, berdasarkan perkara 5(3) Perlembagaan Persekutuan, bermaksud hak untuk mencabar apa-apa keterangan yang dikemukakan terhadapnya.

B **Diputuskan**, mengetepikan perintah mahkamah rendah:

(1) Nota prosiding menunjukkan bahawa kandungan laporan perubatan (P2) dan laporan ahli kimia tidak dibaca dan dijelas kepada perayu dengan itu menafikan dia peluang untuk memprotes jika dia hendak. Memandangkan ini adalah kes yang melibatkan penafian kebebasan, C pematuhan ketat dengan keperluan statutori diperlukan. Daripada nota prosiding dan alasan penghakiman adalah jelas yang perayu hanya diberikan peluang untuk merayu atau mempli tetapi bukan peluang untuk membuat representasinya (lihat perenggan 8–9).

D (2) Memandangkan ia adalah kes yang melibatkan penafian kebebasan, penelitian patut diambil oleh hakim perbicaraan untuk menjelaskan kepada perayu apabila dia dipanggil untuk membuat representasinya dan tujuannya. Adalah sia-sia untuk memberitahu perayu untuk membuat representasi jika dia tidak diberitahu bahawa ia adalah peluang untuknya E memprotes atau menentang laporan dan fakta yang dikemukakan oleh pihak polis atau apa-apa yang dikemukakan menentangnya dan sama ada dia akan mengambil khidmat peguam untuk mewakilinya. Tidak terdapat apa-apa di dalam nota prosiding yang menunjukkan bahawa hakim perbicaraan telah menjelaskan perkara ini kepada perayu (lihat F perenggan 8).

(3) Mahkamah bersetuju bahawa adalah tidak mencukupi untuk tujuan memutuskan sama adaa seseorang itu adalah penagih dadah dalam maksud s 2 Akta untuk semata-mata bergantung ke atas keputusan G positif ujian air kencing seseorang. Seseorang itu mesti diletakkan di bawah pemerhatian dan ujian-ujian dijalankan untuk melihat sama ada dia menunjukkan gejala menagih dadah (lihat perenggan 5).

(4) Walau bagaimanapun, berdasarkan format Borang 2 adalah mencukupi hanya menyatakan '*Setelah menjalankan ujian-ujian yang perlu diatas …*' H dan tidak perlu untuk menyatakan ujian apa atau langkah yang diambil untuk mengesahkan seseorang itu adalah pengaih dadah. Oleh itu, tidak terdapat dalam hujahan perayu bahawa hakim perbicaraan diperlukan untuk mendapat daripada doktor ujian apakah yang dia telah lakukan untuk mengesahkan yang perayu adalah penagih dadah (lihat perenggan I 5).]

Notes

For cases on personal liberty, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2434–2445.

Cases referred to

Datuk James Wong Kin Min, Minister of Home Affairs, Malaysia & Anor, Re v Datuk James Wong Kin Min [1976] 2 MLJ 245; [1976] 1 LNS 129, FC (refd)
Hoo Thian Siong v PP [1988] 2 MLJ 401; [1988] 1 CLJ 176 (refd)
Roshidi bin Mohamed, Re [1988] 2 MLJ 193; [1987] 1 LNS 59 (refd)

Legislation referred to

Drug Dependants (Treatment and Rehabilitation) Act 1983 ss 2, 6(1)(a)
Federal Constitution art 5(3)

Daren Ling (Daren Ling Advocates) for the appellant.
Mohd Azrul Faidz bin Abdul Razak (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Yew Jen Kie J:

[1] This is the appeal by the appellant against the decision of the sessions court judge, given on 2 March 2012, ordering the appellant to undergo treatment and rehabilitation under s 6(1)(a) of the Drug Dependants (Treatment and Rehabilitation) Act 1983 at the Drug Rehabilitation Centre, Kuching, Sarawak, for two years with effect from 2 March 2012 and thereafter to undergo supervision by Agensi Anti-Dadah Kebangsaan for a further period of two years.

[2] Basically, the appellant raised two issues in this appeal, namely:

(a) that the learned sessions court judge has fallen into error by relying on the medical report (P2) without consultation with the doctor as to what steps had been taken to determine that the appellant is a drug dependant (grounds 2(b) and (c)); and

(b) that the appellant was not given an opportunity to make representation (grounds 2(e), (f) and (g)).

A GROUNDS 2(B) AND (C)

[3] Learned counsel for the appellant, Mr Daren Ling, contended that the learned magistrate arrived at the finding that the appellant is a drug dependant by relying on the chemist report (P3) which stated that the appellant's urine contained amphetamine and methamphetamine and also accepting the doctor's report (P2) that the appellant was a 'penagih dadah'. The magistrate did not find out from the doctor what test he had carried out to certify that the appellant is a drug dependant. Learned counsel for the appellant submitted that it is unsafe to conclude that the appellant is a drug dependant when the doctor who certified him to be a drug dependant in P2 did not state what test had been conducted to reach that finding. To support the contention, *Re Roshidi bin Mohamed* [1988] 2 MLJ 193; [1987] 1 LNS 59 was cited.

[4] In *Re Roshidi bin Mohamed*, Mohamed Ariff J (as he then was) made this observations:

> I note in passing that the definition of drug dependants has a very wide scope before a person can be said to fall under that category. Before one can truly say that one is a drug dependant, it would seem that a certain amount of observation must be carried out on him, and there must be appearance or symptoms of 'psychic and sometimes physical state which is characterized by behavioural and other responses including the compulsion to take drugs on a continuous or periodic basis in order to experience its psychic effect and to avoid the discomfort of its absence'. All of which would have manifested themselves upon observations or reflected in the medical report which should not simply rely upon the positive result of one urine test produced by the doctor on urine sample alleged to be taken from the detainee (not apparently by the doctor himself) but rather by a laboratory technologist. Besides, the medical report has only this to say: 'Saya telah mengesah bahawa saya telah memeriksa penama Roshidi bin Mohamed No. K.P. A 0613390 pada 6 November 1986 dan dengan ini memperakui bahawa orang tersebut ialah seorang penagih dadah dalam erti section 2, Akta Penagih Dadah (Rawatan dan Pemulihan) 1983'. Indeed paras 2–3 of the medical officer's affidavit (encl 9) clearly indicated that he only took the detainee's medical history and did a physical examination on him and caused the urine test to be done. On 10 November 1986, upon receipt of the report stating that the urine of the detainee contained morphine, he certified that the detainee was a drug dependant within the meaning of the Drugs Dependants (Treatment and Rehabilitation) Act 1983. Obviously, there is nothing in his report to indicate that he had made a thorough observation on the detainee over a certain period to detect the symptoms on the detainee before certifying that he fell within the category of drug dependants within the meaning of the definition in s 2 of the Act. His report is so bare and did not give any account of the result of his observation over a period to indicate the symptoms he had detected while making observation.

It would appear that based solely on the positive urine test of urine sample alleged to be taken from the would-be detainee, the medical officer decided to certify that the detainee is a drug dependant within the meaning of s 2 of the Act. This is insufficient for the purpose of the definition of a drug dependant in my view.

[5] The court is in agreement that it is insufficient for the purpose of deciding whether a person is a drug dependant within the definition of s 2 of the Drug Dependants (Treatment and Rehabilitation) Act 1983 to rely solely on the positive result of the person's urine. The person must be put under observation and tests be carried out to see whether he manifests symptoms of drug dependence. However, based on the format of *Form* 2 it suffices to merely state 'Setelah menjalankan ujian-ujian yang perlu di atas …' and there is not necessity to state what test or steps have been taken to certify that the person is a drug dependant. As such, I see no merit in the appellant's contention that the learned magistrate find out from the doctor as to what tests he had done to certify that the appellant was a drug dependant.

GROUNDS 2(E), (F) AND (G)

[6] Mr Daren Ling submitted that the right to representation means the right to protest, which by necessary implication and read together with art 5(3) of the Federal Constitution, is the right to challenge whatever that is brought against him. It is not the same as making an appeal or plea, citing *Re Roshidi bin Mohamed* and *Hoo Thian Siong v Public Prosecutor* [1988] 2 MLJ 401; [1988] 1 CLJ 176. It was submitted that in the notes of proceedings and the grounds of judgement, it is stated that the appellant was given an opportunity to representation and he said 'I do not wish to be sent to PUSPEN. I need to take care of my mother who is sick. I need to take care of my family. I pray for last chance and I am willing to go to PUSPEN if I commit the same offence in future'. It was submitted that what the appellant had said tantamount to appeal or plea and not representation to the learned magistrate.

[7] In *Hoo Thian Siong*, it was held:

> The Act specifically enacted the words 'giving such person an opportunity to make representations'. Making representations is not the same as making appeals or pleas. Making representations here means the right to protest, which by necessary implication and reading it in the context of Article 5(3) of the Federal Constitution, is a right to challenge whatever is being brought against him.
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> In any event, there is no record that the applicant here was given that opportunity of making representations, not merely making appeals and pleas. This is a case of deprivation of liberty and it was said in *Re Datuk James Wong Kim Min; Minister of Home Affairs, Malaysia & Ors v Datuk James Wong Kim Min* [1976] 1 LNS 129 that strict compliance with the statutory requirements must be observed. It is evident this was not observed in the proceedings before the learned magistrate on 13 April 1987. *Serenti* is not a Butlin's Holiday Camp. Though it is for the applicant's own good, still it is a deprivation of his liberty. On this ground alone, the order of the learned magistrate made under s 6(1)(a) of the said Act is invalid. The court therefore set aside the order of the learned magistrate made on 13 April 1987.

[8] It is vividly clear from the notes of proceedings and grounds of judgment that what the appellant said while making the 'representation' is akin to making an appeal or plea. Given that it is a case which involves deprivation of liberty, care must be taken by the learned magistrate to explain to the appellant when he was called upon to make his representation and the purpose of it. It is meaningless to tell the appellant to make a representation if the learned magistrate did not tell him that this is the opportunity for him to protest or object to the reports and the facts presented by the police or anything presented against him and whether he would like to engage counsel to represent him. There is nothing in the notes of proceedings to show that the learned magistrate had explained this to the appellant. On the contrary, the notes of proceedings show that the contents of the medical report (P2) and the chemist report (P3) were not read and explained to the appellant, thereby depriving him of the opportunity to protest if he had wanted to.

[9] As this is a case which involves deprivation of liberty, a strict compliance with the statutory requirement is required. See *Re Datuk James Wong Kin Min, Minister of Home Affairs, Malaysia & Anor v Datuk James Wong Kin Min* [1976] 2 MLJ 245; [1976] 1 LNS 129. I regret to say that the appellant had merely been given an opportunity to make his appeal or plea but not the opportunity to make his representation. Therefore, in exercise of my revisionary power, I quash and set aside the order made by the learned magistrate on 2 March 2012.

Lower court's order set aside.

Reported by Ashok Kumar